NO. 22722

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WINSTON BRYANT MC CONNEY,

APPELLANT,

V.

UNITED STATES OF AMERICA

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT

MURRAY B. PETERSEN,

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This is an appeal from an order made November 14, 1967, and entered in Criminal docket November 15, 1967, by the United States District Court for the Northern District of California, pursuant to a finding of guilty to one count of unlawful sale of narcotic drug in violation of title 26, U.S.C. §4705 (a). Pursuant to Grand Jury indictment 41110 in the aforementioned court, the district court's jurisdiction was invoked under 26 U.S.C. §4705 (a), Unlawful Sale of Narcotic Drug - Heroin. Defendant's motion for new trial was made, filed and denied November 14, 1967. Defendant gave timely notice of intent to appeal the conviction on the 14th day of November, 1967. Jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under the previsions of 28 U.S.C. §1291.

FACTS OF THE CASE

Appellant was charged with one count of violation Title 26, U.S. Code §4705(a) to wit: Unlawful Sale of Narcotic Drug - Heroin (Sale without transfer, completion, filing and retention of Treasury Department form), in a three-count indictment in which his co-defendant on the first count, Paul F. McAlee, was named as sole defendant on the succeeding counts. Appellant was found guilty as charged in a jury trial in the U.S. District Court for the Northern District of California, the Honorable Alfonso J. Zirpoli presiding. Judge Zirpoli also presided over the prior trial of first count co-defendant, Paul F. McAlee.

The circumstances leading to appellant's arrest were as follows: A Federal Agent, Stephen S. Chesley, arranged through Jesse Coy, an ex-felon and a paid Federal informer, for a sale of narcotics to take place at 1650 Oxford Street, Apt. No. 7, in Berkeley, Alameda County, California. On the date of the alleged transaction, Agent Chesley met the informer, Jesse Coy, in the living room of said apartment. Following some minutes of conversation, McAlee appeared, and, indicated that everything was ready. Agent Chesley gave Coy some marked money. The interior of the bathroom could not be seen from Agent Chesley's position in the living room, but evidence is conflicting as to whether the bathroom door was open or closed at that time and

accordingly is also conflicting on whether the conversation between McAlee, Coy and Agent Chesley could be heard from the bathroom and therefore form the basis for an adoptive admission of complicity in a conspiracy. Evidence was also conflicting on whether any view of the interior of the bathroom was possible from any position Agent Chesley may have occupied in the hallway. Coy tendered the marked money to co-defendant McAlee in the bathroom. Evidence is conflicting as to whether McAlee directed it be handed to Appellant McConney or if appellant siezed the money from McAlee. Appellant McConney departed the apartment house with the marked money. McAlee, in exchange for the tender of marked money, showed to the paid informer, Jesse Coy, a paper tablet on which was a white powder. Coy picked up the paper tablet with the white powder and then handed it to Agent Chesley who then administered an identification test in the living room. It was later determined that the powder did contain some heroin.

Before the commencement of the trial, defense counsel moved for a continuance to obtain the presence of a necessary material defense witness, Jesse Coy, who was absent but who had been ordered to report to the U.S. Attorney Bancroft prior to the trial for the purpose of being available as a defense witness. The paid informer, Jesse Coy, had been named in a Federal warrant as a reluctant material witness at a previous mistrial of the case and had been ordered to remain available to testify at the next trial. Notwithstanding the prior order and warrant and the

obligation of the U.S. Attorney to assist in obtaining the presence of the informer, Coy, as ordered by the court, the matter was left in the hands of the Berkeley Police Department who failed to produce the witness. Defense counsel had reasonably relied upon the efforts of the Federal authorities to procure the attendance of the paid informer, Jesse Coy, since counsel's previous efforts to obtain the presence of this witness had been frustrated until the Federal Marshal had arrested him and placed him in custody.

The trial court denied Appellant's motion for a continuance, although an affidavit in support thereof was submitted and an offer of proof made, that the testimony of Coy was essential to the defense case and also that he, Coy, could probably be located and his attendance procured in about 30 days. The prosecution, U.S. Attorney Bancroft, the same person ordered by Judge Carter to produce the reluctant witness, (Appendix C) resisted the motion for a continuance on the sole basis that the defense counsel had failed to show that the absent witness could be procured within a reasonable time.

Although denying the continuance for the purpose of obtaining the presence of the absent material witness, the trial court admitted into evidence a tape recording of a prior interview with the witness. The contents of this interview were contrary to and contradictory of the sworn testimony made by informer Coy at the prior trial of co-defendant McAlee. The evidence of

the statements made on the recording was limited by motions of the prosecution and admitted only insofar as they contradicted prior testimony of Coy made during the trial of co-defendant McAlee and were thus against his, Coy's, penal interest; i.e., the danger of prosecution for perjury. Thus limited, the tape recorded statements were admitted.

The trial court refused to allow the testimony of defense witnesses, Chris Reume and Nancy Renner, in re Jesse Coy's background notwithstanding the fact that their testimony was to have been corroborative of and a replacement and substitution for that which was denied to the defense by virtue of the absence of the informer Jesse Coy. The witness Coy's absence prevented the foundation necessary to completely show the relevancy of the testimony of witnesses Reume and Renner.

The trial court, over defense objection, permitted testimony of Agent Chesley containing heresay statements made by informer Coy and, only after the jury had heard the hearsay statements, was some of the testimony stricken.

Throughout the trial, the court broke into the examination of witnesses and appellant and participated in the cross examination of appellant, all in full view of, and within hearing of the jury.

The court recalled testimony from the prior trial of first-count co-defendant, McAlee, and although the information was not in evidence or otherwise before the court, refused the

defense counsel's offer of proof, solely on the basis of this recollection.

SPECIFICATIONS OF ERROR RELIED UPON

1) The District Court erred in not granting Appellant's motion for a continuance in order to obtain the presence of an essential material defense witness, Jesse Coy in contradiction to the guarantees of compulsory process and due process contained in the Sixth and Fifth Amendments of the U. S. Constitution, and further erred in refusing to admit the related and coorberative testimony of defense witnesses, Chris Reume and Nancy Renner.

2) The District Court erred in taking over the examination and cross-examination of the Appellant and important witnesses within the hearing and within the full view of the jury and thus inferentially showing a preference for the prosecution and denying the appellant a fair and impartial jury and trial guaranteed by the Sixth and Fifth Amendments of the U. S. Constitution.

3) The District Court erred in admitting what was obviously hearsay testimony over objections of defense counsel and thus denied to appellant the procedural due process guaranteed under the Fifth Amendment to the U. S. Constitution.

4) The District Court erred in applying the Federal Statute relating to illegal sales of narcotics [26 USC 4705(a)] which statute violates the provisions against self incrimination contained in the Fifth Amendment to the U. S. Constitution.

QUESTIONS PRESENTED

1. Did the District Court commit error in not granting appellant's motion for a continuance in order to obtain the presence of an essential material defense witness, and did the District Court commit further error by denying a renewal of said motion during the course of the trial after the importance of the testimony of the absent witness had become apparent to all concerned?
2. Did the District Court commit error in taking over the examination and cross-examination of both prosecution and defense witnesses and the examination and cross-examination of the appellant, when in doing so, the trial court interjected itself 96 times into the proceedings within the sign and hearing of the jury?
3. Did the District Court commit error in admitting hearsay testimony over defense objection, which testimony was an important link in the prosecution's proof of appellant's complicity or conspiracy in the crime charged?
4. Did the District Court commit error in applying the Federal Statute relating to the illegal sale of narcotics [26 USC 4705(a)] because compliance with this statute requires a defendant to incriminate himself in violation of the provisions of the Fifth Amendment to the United States Constitution?

SUMMARY OF ARGUMENT

The District Court committed error in not granting appellant's motion for a continuance for the purpose of obtaining the presence of an essential material defense witness. Besides the violation of the compulsory process clause of the Sixth Amendment, the denial of appellant's motion was particularly reprehensible since the prosecution was under Court Mandate to produce the absent witness at the trial. The District Court committed further error and further denied appellant's rights under the Fifth and Sixth Amendments to the Constitution when it denied the renewal of appellant's motion for a continuance, when the importance of the testimony of the absent witness had become apparent to the court, the jurors and the counsel.

The District Court committed clear error in frequently taking over the examination and cross-examination of witnesses within the view and hearing the jury and committed further error in taking over the examination and cross-examination of the appellant; thus, causing the jurors to over-emphasize certain phases of the testimony and to create the impression that the court was doubtful of appellant's veracity.

The District Court committed clear error in admitting the hearsay testimony over the defense objection, which testimony was a significant link in the chain of the prosecution's proof of appellant's complicity or conspiracy in the crime charged. In doing so, the District Court denied the appellant his Constitut-

ionally guaranteed right of confrontation and cross-examination.

The District Court committed error in applying the Federal statute relating to the illegal sale of narcotics [26 USC 4705(a)] since this statute and other statutes related to and implementing it require a person subject to the provisions of the statute to incriminate himself in violation of the provisions of the Fifth Amendment to the United States Constitution.

I

THE DISTRICT COURT COMMITTED ERROR IN NOT GRANTING APPELLANT'S MOTION FOR A CONTINUANCE IN ORDER TO OBTAIN THE PRESENCE OF AN ESSENTIAL MATERIAL DEFENSE WITNESS, AND COMMITTED FURTHER ERROR BY DENYING A RENEWAL OF SAID MOTION DURING THE COURSE OF THE TRIAL AFTER THE IMPORTANCE OF THE TESTIMONY OF THE ABSENT WITNESS HAD BECOME APPARENT TO ALL CONCERNED.

At the commencement of the trial of appellant herein, defense counsel, surprised at the nonappearance of the material defense witness and paid government informer, Jesse Coy, moved the court for a continuance in order to procure the attendance of this defense witness. RT 2:14-18.* In doing so, defense counsel submitted an affidavit certifying to the importance and materiality of the anticipated testimony and the diligent efforts which counsel had made to obtain the presence of this witness. RT 2:18-21, Appendix A and B, Affidavit of Arthur Wells, Jr., First and Second Supplemental Record on Appeal. Defense counsel also made oral representations that the absent witness could probably be located within a reasonable time, should the continuance be granted, RT 3:1-3, and further stated, both in his affidavit and in open court, that it was defense counsel's opinion that the presence of this witness at the trial was necessary for the defense, Appendix B, RT 3:8-9.

Great diligence was displayed by defense counsel in procuring informant Coy's attendance at the previous mistrial in July of 1967 (App. A & B, First and 2d Supp.) This extreme diligence and effort of defense counsel further exemplifies to this court the

*Reporter's Transcript

importance placed upon the testimony of Mr. Coy.

At the previous mistrial of appellant herein, occurring in July 1967, the attendance of the informer, Coy, had been obtained only after he had been arrested and put in custody as a material witness. This procedure, was made necessary by Mr. Coy's refusal to receive defendant's subpoena and his further refusal to receive a government subpoena. Those persons attempting to serve the subpoenas on Mr. Coy reported that he had armed himself with a rifle and butcher knife and barricaded himself in his apartment. Thus frustrated in their efforts to procure the attendance of the material witness, Jesse Coy, the defense next sought and succeeded in obtaining, a Federal Warrant for Coy's arrest as a material witness. Upon being placed in custody and brought before a magistrate, the informer, Coy, was then released to the custody of David P. Bancroft, the Assistant U.S. Attorney and Prosecutor of Appellant, herein.

On the second day of the July 1967 trial, the judge declared a mistrial and ordered the material defense witness, Coy, to make himself available as a material witness when the trial recommenced and in so doing, Judge Carter ordered as follows, as appears in the Reporters Transcript of the proceedings of July 24, 1967. (App.C, RT of prior trial of July 1967, 3rd Supp.)

"THE COURT: Mr. Coy, would you step forward, please. Step right up here.

THE CLERK: This is Mr. Jesse Coy; isn't it?

"MR. WELLS: Over here (indicating).

THE COURT: Mr. Coy, I have just declared a mistrial in this case and it will have to be set for trial again by the calendar judge and I am instructing you that since you are presently under a warrant as a material witness that you are under the order of the Court to be available as a witness and you are to be subject to the instructions of Mr. Bancroft, who is the attorney for the Government, who will advise you as to the trial date*-- next trial date of this case and that you will report to the office of the Berkeley Police Department at eight o'clock in the morning on the morning on which that case is set for trial to be available as a witness in this case.

MR. COY: Yes, sir.

THE COURT: I am doing this because I understand this meets with your convenience.

MR. COY: Yes; yes, sir.

THE COURT: All right. Then if that is the situation, that will be the order; and, Mr. Bancroft will notify you.

MR. BANCROFT: Certainly, your Honor.

THE COURT: And, you will then be available to be a witness in this case.

*(Emphasis Added)

"MR. COY: (Nodding affirmatively).

THE COURT: All right. Then, other than that, I will excuse you then. Then you can go about your business.

MR. COY: Yes, sir; thank you.

MR. BANCROFT: Thank you, your Honor.

(At which time there was discussion between Court and Counsel as to bail, exhibits and instructions; after which time, the Court adjourned the proceedings.)"

From the foregoing, it is eminently clear that defendant-appellant and his counsel were entitled to rely upon the court's instructions to David P. Bancroft, Esq. and to expect that the material defense witness, Jesse Coy, would be present in court at the next hearing date. This clearly appears by the Affidavit of Arthur Wells, Jr., Appendix B and the Order of the Court on July 24, 1967. (Supra) Appendix C. It is also apparent that the Federal authorities were the only persons charged with the responsibility of producing this material defense witness and further, that the Federal authorities had the only procedural machinery likely to be effective in obtaining the presence of the witness at trial and, still further, that the defendant could not expect the witness to cooperate, voluntarily.

A criminal defendant is entitled to have compulsory process for obtaining witnesses in his favor, United States

Constitution, Amendment 6, which states as follows:

> "Amendment 6. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (Emphasis added).

It is clear by reading this Amendment and considering the plain meaning thereof, that the denial of an opportunity to have a witness testify in his behalf is a denial of the guarantee of compulsory process of the Sixth Amendment. When a denial of the opportunity to have a witness appear in his behalf is the fault of the prosecution, then the violation of the guarantees of the Sixth Amendment are even more reprehensible. Barber v. Page, 390 US 719, 88 S.Ct. 1318, 20 L Ed.2d 255. As has been clearly proved heretofore, the prosecution had the responsibility to obtain the presence of the absent witness; had exclusive control of the necessary process to obtain his presence; failed to produce the absent witness' presence and, further, failed to show any diligence whatsoever in attempting to obtain this absent witness' presence, RT 79: 2-25, 80: 1-19. The questioning proceeded as follows:

> "MR. WELLS: I would like to just go ahead and inquire further. The stipulation is of no point. I will accept the stipulation he was under court order

to be here.

THE COURT: Now, do you want to further develop that?

MR. WELLS: I don't want to further develop that.

THE COURT: I think I should myself. If you gentlemen won't, I will do it.

You say you saw him last in court, is that right?

THE WITNESS: After court was over, yes, sir.

THE COURT: Had the Court given directions to this man to return?

THE WITNESS: That's correct.

THE COURT: And have you seen him since?

THE WITNESS: No, I have not.

THE COURT: Have you made any effort to find him or locate him since?

THE WITNESS: Yes, sir.

THE COURT: Have you been able to find him or locate him since?

THE WITNESS: No, sir.

MR. WELLS: Q. What efforts have you made?

A. The Berkeley Police Department.

THE COURT: You requested them to find him?

THE WITNESS: That is correct.

MR. WELLS: Q. Did you go out looking for him yourself?

A. I haven't had the time, sir.

Q. You haven't had the time?

A. That's correct.

Q. You had more important things to do?

A. I have been out of town the vast majority of the last two months, sir.

Q. Did anyone else in your department go looking for him, to your knowledge?

A. To my knowledge, I believe some of them have. I'm not sure.

Q. You don't know what they have done in that regard?

A. No, sir, I don't.

Q. You haven't followed it up since you came back from out of town?

A. I just came back Friday."

So reprehensible is such conduct that it has been held that if the absence of the witness is chargeable to the negligence of the prosecution, rather than to the procurement of the accused, evidence given in a preliminary hearing by such witness before a United States Commissioner cannot be used at the trial. Motes v. U.S.,178 U.S.458(1900),44 L.Ed.1150,20 S.Ct.993. It is not clear in the instant case whether the testimony of Jesse Coy was used at a preliminary examination or not. However, the holding of the Motes case, (supra) is cited here to show the importance which must attach to the prosecution's hindering the defense efforts to pro-

duce this essential material witness.

Compulsory process, as referred to in the Sixth Amendment to the United States Constitution, particularly where ordered by a Federal Judge, Appendix B and C, obviously requires a degree of diligence and good faith in its performance far greater than was provided in the instant case.

Despite the evident importance of this absent material, witness' testimony and the diligent efforts of the defense in attempting to procure his presence at trial and the inability of the defense to do so without the cooperation of the Federal authorities, we nevertheless find the Prosecuting Attorney David P. Bancroft, who was charged with the responsibility of producing that witness in court, objecting to the defense motion for a continuance. RT 3:24-25. On this basis alone, and without going further, it can be said that the Prosecuting Attorney, David P. Bancroft, here assumed a most inconsistent position in that he had the responsibility to produce the witness [p. 3 this Brief, Supra) was dilatory in not doing so, [RT 79:2-25, RT 80:1-19] and then rather than apologizing to the court for his failure to perform, instead proceeded to object to the defense motion for the continuance which, by any measure, would be considered reasonably necessary in view of the defense's surprise at the absence of this essential witness, RT 6:1-2.

When we consider the foregoing, as well as U. S. Attorney Bancroft's objections to the introduction of the taped statement

of the absent witness, even after stating to the court his willingness to allow its admission, RT 4:9-15, and his further energetic objections to the testimony of defense witnesses Chris Reume and Nancy Renner, RT 174:6, 17-19; RT 179:12-13, it is very apparent that the absence of Jesse Coy was just as important to the prosecution's case as the presence of Jesse Coy was important to the defense. At this point, if not before, there could have been no doubt that Jesse Coy was an essential and material witness.

In the face of the foregoing, it is very clear that the trial court overstepped its bounds of discretion in denying the motion for the continuance. Denial of a reasonable request to obtain the services of a necessary witness is effectively a suppression of evidence and is a violation of the fundamental right of due process. United States vs. Pate, 345 F.2d 691 (1965). The court saying there at page 696:

> "In the wake of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), holding that the Sixth Amendment right to counsel is embraced in the Fourteenth Amendment to protect that right against state action, it follows that the right of compulsory process must similarly be included in the Fourteenth Amendment protection. This right is as 'implicit in the concept of ordered liberty' as the right to counsel . . . . . Unreasonable denial of a continuance to afford the defendant a timely opportunity to obtain witnesses by compulsory process was held to be a violation of this constitutional right in Paoni v. United States, 281 F. 801 (3rd Cir. 1922)."

In accord with the Pate case, and further holding that

failure to stay within proper bounds of discretion is basis for appellate court intervention, is the case of Scott v. United States, 263 F.2d 398. In that mail fraud case involving a charge of conspiracy, a co-conspirator failed to appear, although process to obtain his presence had been instituted. The court held that the trial court's discretion in not granting the postponement for the purposes of obtaining the presence of the absent witness, was necessarily subject to review and to correction, since its just limits had been exceeded. The appellate court then stated that it was a virtual error to deny the continuance, saying at page 401:

> "Desirable, indeed necessary, as it is to proceed with criminal trials without undue delay, indeed with proper dispatch, and wide as is the discretion of the court in passing on applications for postponement, the exercise of that discretion is necessarily subject to review and to correction when its just limits have been exceeded. The same thing is true of the granting of a mistrial."

Accord: Younge vs. United States, 223 F.941 certiorari denied, 245 U.S. 656, 38 S.M. 13, 26, L.Ed. 533 (1917). In this case, it was held that the trial court should have ordered a postponement even after the trial had commenced, in order to procure the presence of the absent witness. In the instant case, as the trial progressed, the importance of the testimony of the absent witness became increasingly apparent, to the court and jurors aloke. The trial should have followed the rule of the Younge case, (supra) and ordered a mistrial or continued the

matter until the absent witness' presence could be assured when given the opportunity by defense counsels' renewed motion for a continuance, RT 86:20-25, 87:1-8.

In view of the reasonableness of the defense motion for a continuance to obtain the presence of a necessary material witness, the exclusiveness of the responsibility of the prosecution to produce this witness and its dilatory failure to do so, we come to the inescapable conclusion that the trial court committed clear error in failing to grant the defense motion for a continuance. There is no remedy now except for the Court of Appeals to order a new trial.

II

THE DISTRICT COURT COMMITTED ERROR IN TAKING OVER THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES BEFORE THE JURY AND IN TAKING OVER THE EXAMINATION AND CROSS-EXAMINATION OF THE DEFENDANT-APPELLANT, WHEN IN DOING SO, THE TRIAL COURT INTERJECTED ITSELF 96 TIMES INTO THE PROCEEDINGS WITHIN THE SIGHT AND HEARING OF THE JURY.

The trial court interrupted the proceedings 96 times between the hours of 2:00 p.m. on the first day of trial and 12:00 noon on the following day, Appendix D. In so doing, the court asked specific questions of both prosecution and defense witnesses and engaged in the examination and cross-examination of the defendant-appellant (See Appendix D). In so doing, the trial court wrested control of the proceedings away from trial counsel and vested it in itself and therefore emphasized in the minds of the jury the importance of the questions asked by the court as distinguished from questions asked by counsel. This indiscriminate and prejudicial interference by the court was objected to by defense counsel, RT 35:6-7, and prosecution, RT 45:4-7. In making these objections, however, it is apparent that both defense and prosecution were aware of the political expediency of avoiding the antagonism of the court, since their objections were couched in non-aggressive terms.

Notwithstanding the short cessation of this improper questioning by the trial judge, it is clear that its prompt resumption, RT 39:3-4; RT 46:22-24 and the conduct of the trial court through-

out the trial in taking over the examination of witnesses and constantly interjecting comments and questions of its own, was sufficient to prejudice appellant's case since the court appeared to the jury to have cast off its cloak of impartiality whenever it interjected itself into the questioning of witnesses. Such conduct warrants a reversal of the lower court's decision, Williams v. United States, (DC App.Ct.) 228 At1.2d 846, wherein the court, in reversing the conviction, stated at page 847:

> "The judge must not inject himself into the examination or cross-examination of witnesses as to assume the role of an advocate, or seem to favor one party against the other, especially in a criminal case."

Then the court continued at page 848:

> "A trial judge has the responsibility of moving a trial along in an orderly and efficient manner; in short, he has the responsibility of managing the conduct of a trial. But that does not mean overmanaging, certainly not to the point of repeated overparticipation in examination of . . ."

Where a court cross-examines defendant's witness in a prosecution and thereby casts doubt on the credibility of the witness and a conviction results, the prejudicial conduct of the court requires a reversal of the judgment on appeal and the granting of a new trial. People of the State of New York v. Kenney, 246 NY Supp 2d 92.

In the case of Jackson v. United States, 329 F.2d, 893 (1964), the court pointed out that a trial court may intercede to overcome seeming inadequacy of the examination of witnesses. However

helpful as this is in non-jury trials, the court should exercise considerable restraint before attempting to do so before a jury because of the prejudicial consequences of the judge's intervention. The appellate court there noted an inordinate number of instances of extensive examination and cross-examination of witnesses and comments by the court and concluded that the cumulative effect of all the trial judge's participation could well have been prejudicial and, at the very least, could have led jurors to give undue weight to the points treated by the judge. The court stated at page 894:

> "That the judge may be able to examine witnesses more skillfully or develop a point in less time than counsel requires does not ordinarily justify such participation. That is not his function."

The instant case is not one in which the trial court was making available to the jury information not otherwise brought out by inexperienced counsel. It is quite apparent that both prosecution and defense counsel were experienced in trial matters and could well have benefited without the constant interruptions from the bench. Although defense counsel, Arthur Wells, Jr., objected to the court's interference, he did so in guarded terms, showing acute awareness of the possible danger to the defendant's cause by a forceful statement of the objection. After a long period of standing while the trial court took over his cross-examination of a witness, defense counsel stated at RT 35:6-7:

> "MR. WELLS: I am through with my cross-examination,

so I might as well be seated."

and at RT 45:4-7, the prosecution similarly objected as follows:

"MR. BANCROFT: Your Honor, if I may have this witness for just two more minutes I think Your Honor will see the purpose for this kind of examination, if I could try to establish some distances for foundation purposes."

From the foregoing, it is clear that both counsel were bothered and embarrassed by the court's extensive questioning of the witnesses, but fully realized the risk of emphasis that would result from a strong objection. As stated in U.S. v. Hill, 332 F2d 105(1964)p106

> "Counsel for defendant in a criminal case, is indeed in a difficult and hazardous predicament in finding it necessary to make frequent objections in the presence of a jury to questions propounded by the trial judge. The jury is almost certain to get the idea that the judge is on the side of the Government. The cloak of impartiality which the judge should wear is destroyed."

Although the prejudice of the court's examination of witnesses clearly influenced the course of the trial, by far the most damaging part of the trial court's interference was in the active participation which it took in the cross-examination of the appellant-defendant, RT 197:7-21, which proceeded as follows:

"THE COURT: May I ask one question? Just how

much money did he owe you?

THE WITNESS: Exactly it was around --

THE COURT: Not around. Didn't you know exactly?

THE WITNESS: I had it written down on a little paper.

THE COURT: Oh, you did have it written down on paper.

THE WITNESS: Yes.

THE COURT: I thought a moment ago you said you didn't keep any record of the amount of money he owed you. (Emphasis added)

THE WITNESS: I didn't say I didn't keep a record of it, I said most of the time I keep it in my head.

THE COURT: All right, how much did he owe you?

THE WITNESS: I had it down for $537."

The court continued at RT 200:24-25:

"THE COURT: All right, he said no. Didn't he ask you why he should go there?"

From the foregoing, it is clear that in the instant case the questions asked by the trial court were not only inquisitive, but also obviously demonstrated to the jury that the court was doubtful of the veracity of the defendant. Such conduct on the part of the trial court is reversible error. U.S. v. Hill, 332 F2d 105 (1964).

Seeming unfairness or partiality of the trial judge constitutes prejudicial error requiring a reversal of the conviction and a remand for a new trial. In furtherance of this doctrine, the court said in the Hill case (supra), at page 106:

> "A fair and impartial trial is guaranteed to every defendant, and fundamentally means a trial before an impartial judge and by an impartial jury. In aid of truth and in furtherance of justice, the court may question a witness, -- in fact he may call and question a witness not used by either party, -- but in so doing the court should be careful to preserve an attitude of impartiality and guard against giving the jury any impression that the court was of the opinion that defendant was guilty. . . ."

In accord is United States v. Carmel, (7th Cir.) 267 F2d 345, 350, where this court stated:

> "We realize that an alert and capable judge at times feels that he can assist in developing the evidence by participating in the interrogation of witnesses. However, he would ordinarily do well to forego such intrusion upon the functions of counsel, thus maintaining the court's position of impartiality, in the eyes of the ever-observant jurors."

In the instant case, appellant-defendant was forced to take the stand because he was denied the opportunity to have witnesses appear in his behalf, (See Arguments I and III).

Over a period of time which took three pages of the Reporter's Transcript, RT 197:7-21, RT 200:24-25, RT 201:3-16, the court examined, ridiculed and castigated the appellant before the jury, thus causing such irreparable prejudice to the defendant's case

that it can now be remedied only by a new trial. It is essential in the interest of justice, as well as in the furtherance of the Constitutional guarantee of a fair and impartial jury (U.S. Const. Amend.VI) that this appellant be accorded a new trial. The Sixth Amendment provides in part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." (Emphasis added.)

A jury cannot long remain impartial in the face of the trial court's critical cross-examination of defendant-appellant. It is clear that appellant herein was denied his Constitutional guarantees of a fair jury by the court's expressed doubt of appellant's veracity. Page 16 (this Brief).

The U.S. Court of Appeals for the 7th Circuit decided a case similar to that of appellant herein, in United States v. Hill, 332 F.2d, 105 (1964). In that case, the trial court asked 35 questions of the defendant on cross-examinations. In reversing the lower court decision, the appellate court stated that a number of the questions were so phrased that the jury might well have received the impression that the judge was doubtful of the truthfulness of many of the defendant's statements made under oath.

When the Constitution requires a hearing, it requires a fair one, held before a tribunal which at least meets currently prevailing standards of impartiality. Wong Yang Sung v. McGrath, 339 U.S. 33, P.50 (1950), 94 L.Ed.616, 70 SC 445.

In addition to the foregoing, the cumulative effect of a court's questions and statements can constitute prejudicial error, requiring a new trial. United States v. Hill, 332 F.2d 105 (1964).

In the instant case, the trial court attempted to recover from the error of constantly interjecting comments and questions into the trial. In its instructions to the jury at RT 230:15-24 inclusive, the court stated:

> "During the course of the trial I asked questions of the witnesses in order to bring out facts not then fully covered by the testimony. Do not assume that I hold any opinion as to the matters to which my questions relate. Remember at all times that you as jurors are at liberty to disregard all comments of the Court in arriving at your own findings as to the facts. You will note I say 'comments of the Court' in arriving at your findings as to the facts. I am talking about my comments as they relate to facts, not as they relate to the law." (Emphasis added)

This instruction is clearly not corrective or remedial of the situation accumulating during the trial of appellant herein. The court instructing as above, informed the jurors that they were at liberty i.e. could voluntarily disregard the comments of the court. This is in no sense a mandate to disregard the court's participation, nor could it in any sense accomplish it's intent i.e. to erase the memory of the jurors. Obviously, the court's comments and the impression which they created were still in the minds of the jurors and permission to erase the recollections which created them, could not possibly remedy the wrong done.

Inflammatory and prejudicial testimony admitted, as in the

instant case, can be so damaging that no amount of cautionary instruction can eradicate the impression of the testimony from the juror's minds. Hilton v. United States, (5th Cir.) 221 F.2d 338.

In view of the foregoing, and because the trial court clearly exceeded the bounds of propriety in its participation, over objection, in the examination and cross-examination of witnesses and defendant; thus improperly influencing the jury by emphazing certain phases of the trial and casting doubt on the veracity of the defendant, we come to the inescapable conclusion that the trial court committed clear error, and appellant herein must be accorded a new trial.

III

THE DISTRICT COURT COMMITTED ERROR IN ADMITTING HEARSAY TESTIMONY OVER THE DEFENSE OBJECTION, WHICH TESTIMONY WAS THE PRINCIPAL BASIS OF THE PROSECUTION'S PROOF OF APPELLANT'S COMPLICITY IN THE CRIME AND WHICH HEARSAY TESTIMONY DEPRIVED APPELLANT THE CONSTITUTIONALLY GUARANTEED RIGHT OF CONFRONTATION.

During the course of appellant's trial the prosecution relied heavily on hearsay testimony of Agent Chesley to establish appellant's alleged connection with the events forming the basis of the offense charged. The use of hearsay testimony is governed by the provisions of the Fifth Amendment due process clause and the Federal Rules of Criminal Procedure. The Fifth Amendment of the Constitution provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (Emphasis added)

The procedural due process referred to in the Fifth Amendment is defined in Ex parte Wall, 107 US 265, (1883) where the court states at P.289:

> "In all cases that kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the estab-

lished customs and usages of the courts."

Furthermore, in criminal prosecutions, the due process clause of the Fifth Amendment supplements the specific procedural guarantees enumerated in the Sixth Amendment and also supplements the preceding clauses of the Fifth Amendment for the protection of persons accused of crime. Crain vs. United States, 162 US 625, p.645 (1896). In supervising the conduct of the Lower Federal Courts, the functions of the Supreme Court included the duty to establish and maintain civilized standards of procedure and evidence. McNabb vs. United States, 318 US 332 (1943).

Rule 26 of the Federal Rules of Criminal Procedure states as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principals of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

It is clear that in Federal Courts, the common law rules of evidence prevail.

No one seriously questions the proposition that the hearsay rule is inherent in the Anglo-American common law rules for the admissibility of evidence, McCormick on Evidence in § 223, 5 Wigmore Evidence 27 (3rd Ed.1940), since its popularity grew with the transition from depositional to witnesses' oral testimony in

the latter part of the 17th century, predating the origins of this country by 100 years. Statutes have frequently been enacted excluding hearsay evidence as being inherently untrustworthy and unreliable. In California, the prohibition of hearsay is codified in Division 10, Chapter 2 in the California Evidence Code, §§ 1200 to 1205 inclusive. In Busby v. United States of America, (9th Cir.1961) 296 F2d 328 at page 332, hearsay was defined as "that evidence of out of court assertions by third persons which is admitted to prove the truth of the matter asserted."

In Criminal Prosecutions the use of hearsay evidence to convict a defendant is especially reprehensible since the defendant's life or liberty are usually at stake. The unavoidable incident of hearsay testimony is that the person who spoke is not present in court, therefore not subject to the safeguards of cross-examination and not visible to the jury so his demeanor can be observed during the course of his questioning.

In the instant case, the prosecution introduced hearsay testimony of co-defendant, Paul F. McAlee's statement made out of court and implicating the appellant by way of complicity or conspiracy in the alleged crime RT 66:1-7. In doing so, the prosecution effectively prevented the appellant from having the opportunity of cross-examining this witness. The record is silent as to the disposition of McAlee's case, however, it is clear that he did not appear to testify at appellant's trial. Thus it was that appellant was accused by an absent witness and was thus

denied his guarantee of confrontation provided in the Sixth Amendment of the United States Constitution. (Supra). The right to confront witnesses at the time statements are made is paramount in a criminal trial. Goings v. United States, (8th Cir. 1967) 377 F2d 763. Stated differently, the right of cross-examination is included in the Constitutional right of every accused to be confronted with the witnesses against him. United States v. Bozza, (2d Cir. 1966) 365 F2d 206. Furthermore, this right of cross-examination cannot be side-stepped because it happens to be convenient for one of the parties. Holman v. Washington, (5th Cir. 1966) 364 F2d 618.

The testimony should not have been admitted for the additional reason that it did not qualify under any exception to the hearsay rule propounded at the trial.

In the instant case, hearsay testimony of Agent Chesley was admitted as to what co-defendant Paul F. McAlee had said upon reporting to Chesley and Coy that everything was ready. Over defense's objections, RT 58:7, he was permitted to testify as follows: RT 66:1-7.

"MR. BANCROFT: Q. Agent Chesley, I am referring to that point in your testimony in which you stated -- at which Paul McAlee, the second man involved here, appeared out of the hallway into the living room. Did he state anything when you saw him so appear, did he state anything at all?

A. Yes, he said, 'We are ready, get the money.'"

The answer, above quoted, was clearly hearsay and objectionable as such and further, was obviously an attempt by the prosecution to show a "conspiracy and/or joint venture" as between McAlee and appellant. The prosecution's theory seemed to be that the statement was admissible, either as the statement of an agent or as an adoptive admission. Both arguments must fail; first, since there was no showing that McAlee was an agent authorized to speak for appellant, McCormick, Evidence (1954 ed) §244 and secondly, adoptive admission, because to be effective as such, it must first appear that the statement was made, heard and understood by the person from whom the objection is expected, McCormick, Evidence (1954 ed) §247 p.530. In the instant case evidence is conflicting as to whether the bathroom door was open or not and accordingly, conflicting as to whether appellant McConney who, it is well established, was in the bathroom at the time, could have heard the statement of McAlee to Coy and Chesley. McConney's uncontradicted testimony was that he did not hear any statement. The audibility of the tone as heard by Agent Chesley in the living room, was irrelevant since that does not establish the fact of its being audible to McConney across the hall in the bathroom with possibly a closed door, intervening. It is further apparent that there was no showing that the innocuous phrase "we are ready", even if said, was such as to require denial by appellant. Evidence

of an accusatory statement and defendant's failure to deny same is admissible only if circumstances are such as to warrant the inference that defendant would naturally have contradicted a statement if he did not assent to its truth. Kelly vs. United States, 236 F2d 746. In the instant case, no such circumstances were present. It wasn't even established that the defendant could have heard whatever statement might have been made. In Kelly v. United States, (Supra) the court stated the further proposition that evidence and statements made by persons other than witnesses introduced in order to establish truth of statements are inadmissible as hearsay. The court further stated that the admisssion of this hearsay alone would have constituted sufficient ground for a reversal. In discussing adoptive admissions, the court further observed at page 750:

> "the cases repeatedly emphasize the need for careful control of this otherwise, hearsay testimony." (Citing case)

In view of the foregoing, it is clear that the quoted hearsay testimony (supra) was improperly admitted over defense objection and the trial court committed clear error in so ruling, thus depriving appellant herein of the due process guarantees of the Fifth Amendment to the Constitution.

Notwithstanding technical offensiveness of the testimony quoted (supra) as hearsay, a further objectionable aspect appears. At this point in the trial of appellant it had become apparent that co-defendant McAlee's statement "we are ready" if made, was

extremely damaging to the appellant in this case as suggesting a conspiracy or the complicity with the appellant. At this time, the trial court should have realized the importance of the testimony of this absent witness and further required that by allowing introduction of this testimony that the trial court was denying appellant herein, the opportunity of cross-examining this witness in violation of the confrontation clause of the Sixth Amendment to the United States Constitution.

In absence of waiver, clearly not present in the instant case since timely objection was made, a defendant's Federally guaranteed Constitutional right to confrontation is denied by a denial of the right to cross-examine witnesses who testified against him. Brookhart v. Janis, (1966) 384 US 1, 86 Sup.Ct. 1245, 16 L.Ed.2d 314. The cross-examination of the accuser is a major reason underlying this Constitutional guarantee of confrontation. Pointer v. State of Texas, (5th Cir. 1965), 380 US 400, 85 Sup.Ct. 1065, 13 L.Ed.2d 923.

Further prejudicial hearsay testimony was given when Agent Chesley acted as a rebuttal witness, RT 207:1 to RT 212:3, incl. Appearing on those pages were questions asked by the U. S. Attorney which, obviously elicited hearsay testimony from the witness. This was promptly objected to by defense counsel, at RT 208:1. The court, however, permitted the line of questioning to continue and thus to expose the jury to a great number of hearsay statements. Eventually defense counsel was forced to ask for a con-

tinuing objection to all this hearsay, RT 209:20-21. The line of questioning continued through pages 210 and 211, the court finally struck all of the testimony except the last answer of the witness, which was a hearsay answer to the court's own question. Defense counsel asked for an admonition by the court with respect to the jury's having to disregard the prior statements of the witness; however, it is clear that the jury could not erase their recollections, once having heard the statements, notwithstanding the court's order to strike the testimony and its admonition, RT 211:18-23. Indeed, the admonition was worded such that it is doubtful that it could have had much rehabilitative effect at all. The court's admonition was as follows: RT 211:18-23:

> "THE COURT: Yes, you're admonished to disregard the rest of the testimony about the conversation with McConney and what transpired on the street, but you are permitted to consider his statement that Jesse Coy told him he lied when he gave the statement at the office of the attorney." (Emphasis added.)

The statement "that Jesse Coy told him he lied when he gave the statement at the office of the attorney" was obviously sufficient to emphasize rather than de-emphasize the matters just previously heard by the jury. It is very clear that under the circumstances the prejudicial effect of the hearsay testimony remained with the jury notwithstanding the court's admonition.

Prejudicial error occurs when statements heard by the jury are so inflammatory and prejudicial that no amount of caution or instruction can irradicate the impression of the testimony from the jurors' minds, Scott v. United States, 263 F 2d 398.

It is just as clear that appellant was denied the Constitutionally guaranteed right to procedural due process as discussed heretofore. Had the court wanted to have the testimony determined as to its admissibility, this should have been done outside of the hearing of the jury. However, this was not done although other prior arguments and offers of proof were made while the jury was out of the courtroom.

In view of the foregoing procedural defects relating to the improper use of hearsay testimony and the resultant denial of due process resulting therefrom and particularly in consideration of other defects of appellant's trial as discussed heretofore, we again reach the inescapable conclusion that appellant herein must be awarded a new trial. This court should so rule.

IV

THE DISTRICT COURT COMMITTED ERROR IN APPLYING THE FEDERAL STATUTE RELATING TO THE ILLEGAL SALE OF NARCOTICS [26 USC 4705(a)] BECAUSE COMPLIANCE WITH THIS STATUTE REQUIRES A DEFENDANT TO INCRIMINATE HIMSELF IN VIOLATION OF THE PROVISIONS OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is a violation of appellant's privilege against self-incrimination, as contained in the Fifth Amendment to the Constitution, to require him to receive in writing, 26 USC §4705(a), and retain for two years, 26 USC §4705(d), the details of transactions of an inherently suspicious nature. It is a further violation to require appellant to divulge to authorities the details of such transactions, 26 USC §4705(d), and to require him to submit in writing detailed monthly reports of all his narcotic sales, 5 CFR §151.201. The implementation of this statute is unconstitutional basis for criminal prosecution.

Methods employed by Congress in federal tax statutes and ancillary provisions must be consistent with the limitations created by the privilege against self-incrimination guaranteed by the Fifth Amendment, Marchetti v. United States, 390 U.S. 39, 88 S.Ct. 695, 19 L.Ed.2d 889 (1968).

In Marchetti v. United States, supra, cited in Grosso v United States, (1968), 390 U.S. 62, 88 S.Ct. 709, 19 L Ed.2d 906, the Supreme Court held that an occupational tax placed on the petitioner created a "real and appreciable" and not merely "imaginary and unsubstantial" hazards of self-incrimination. The court

then pointed out, at page 48, that the petitioner therein was confronted with a comprehensive system of federal and state prohibitions against the activities which were taxed. He was, therefore,

> "Required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would prove a significant 'link in a chain' of evidence tending to establish his guilt."

The court pointed out in Grosso v. United States, supra, p.64, that, similar to Marchetti v. United States, supra, the penalties imposed, in combination with the Federal statutes, placed the petitioner entirely within "an area permeated with criminal statutes", where he was "inherently suspect of criminal activities". It was held that the claim of privilege against self-incrimination was a defense to this prosecution.

In the instant case, we have a situation similar to both that of Marchetti v. United States, supra, and Grosso v. United States, supra, in that persons trafficking in narcotics belong to a class of persons inherently suspect of criminal activities, which activities were closely proscribed and controlled by both federal and state statutes. As Justice Brennan stated, in his concurring opinion, in Grosso v. United States, supra,

> "The statute with respect to a wagering tax compelling disclosure was part of an interrelated statutory system design to coerce information from persons engaged in gambling activities. Significant of the activities

required was the registration of persons so engaged."

Substantially similar to this registration requirement are the provisions of 5 CFR §151.21 providing for registration of persons "who..... sells, deals in, dispenses, administeres, or gives away narcotics", and USC §4705(d) requiring the transferor in a narcotics transaction to retain the order form for two years and, as implemented by 5 Code of Federal Regulations §151.201, to report every month the transactions to the Narcotic District Supervisor for the district in which the vendor is located. In practical effect, these three provisions provide for a minimum two-year registration of a transferor of narcotics.

In Haynes v. United States, 1968 case, 390 US 85, 88 S.Ct. 722, 19 L Ed.2d 923, the Supreme Court held that the statutes requiring registration and taxation of persons suspected of possessing illegal firearms were contrary to the provisions of the Fifth Amendment in that the statute required the registrant to incriminate himself. In the instant case, appellant is required to register pursuant to 5 CFR §151.21 and in doing so to apply by submitting a form 678. Submission of the form automatically results in an investigation of the new applicant, 5 CFR §151.23, and a disclosure of any inventory of narcotics dating back to the previous December 31. An applicant on December 30 would thus incriminate himself as to narcotics he possessed with the past twelve months.

In United States v. Covington, 282 Fed.Sup. 886, the doctrine of Marchetti, Grosso and Haynes cases, supra, was extended to the federal statutes §4741, prohibiting the sale of marijuana, 26 USC 474. This statute provides, similarly to 26 USC §4705(a), the statute under which the appellant was convicted, that the transfer of marijuana, without the written order on the form issued in blank, is prohibited. The wording of 26 USC §4742 is thus substantially similar to 26 USC §4705, the primary difference being that 26 USC §4705 deals in narcotics other than marijuana. A further difference appears in that, pursuant to 26 USC §4741 (a)(1) tax on transfer of marijuana to registrants is a flat $1.00 per ounce, or fraction, and pursuant to 26 USC §4741 (a)(2), $100.00 per ounce when the transfer is to a non-registrant. The tax on narcotics other than marijuana is obtained by the sale of the order forms, which cost one cent each.

From the above comparison it is clear that the statutes taxing the transfer of narcotics other than marijuana are not for revenue purposes.

In the Covington case, supra, the court noted at page 889. that the defendant was:

> "Required simply to provide information, unrelated to any records which he may have maintained, there was no 'public aspects' to the information sought, and the requirements here are directed to a 'selective group inherently suspect of criminal activities'."

26 USC §4705 (a), the statute under which appellant was con-

victed, provides as follows:

> "(a) General requirement. It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

However, the distribution or transfer of narcotics by doctors, dentists, veterinary surgeons and pharmicists and other practitioners, who do so in the course of their professional practice, constitutes an exception. Those in the named professional capacities are specifically exempted from the requirement of submitting the report of the previous month's transfers by the provisions of 26 USC §4705(c)(1) which states as follows:

> "(c) Other exeptions. Nothing contained in this section, section 4735, or section 4774 shall apply --
>
> (1) Use of drugs in professional practice. To the dispensing or distribution of narcotic drugs to a patient by a physician, dentent, veterinary surgeon, or other practitioner registered under section 4722, in the course of his professional practice only: Provided, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed of distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, veterinary surgeon, or other practitioner shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 4773."

From the foregoing, it is clear that the only transferors of narcotics who are required to report and register are those inher-

ently suspect of criminal activity, since all other transferors are exempted from the statutes provisions.

In Covington, supra, the court further stated at page 889 that it did

> "Not feel it was within its province to engraft immunity restrictions on the tax system in question here. Congress has made it quite clear that disclosure of marihuana transfer tax payments is to be made to prosecuting authorities."

Again, the instant case provides ample similarities, since 26 USC 4705, the statute under which appellant was convicted, clearly provides for the disclosure of incriminating evidence to authorities within one month of a transfer and, furthermore, requires retention of duplicate records for a period of two years. These records require the transferor to pur into writing the date, number of items sold and the name of the purchaser. The purchaser and vendor are forbidden to change the registry and class number or the internal revenue district on the form, 5 Code of Federal Regulations §151.164. The information required and contained in the blank forms is clearly such as to establish whether there has been a violation of 26 USC §4701 (tax on importation, production and sales) or °4721 (registration tax on dispensing activities). It is clear, also, that the same information would be inherently useful to state narcotic enforcement officials.

Required of the transferor is the monthly report and retention of records for two years; and, further, that the

transferor maintain his records open to inspection and provide a certified copy upon demand to any state or federal official charged with the enforcement of narcotic laws, 26 U.S. Code §4773. Inspection by state officials could not be expected to be of significant use in the collection of taxes, since the tax is a federal tax. We are thus, again, brought to the point where the clear intent of Congress in enacting 26 USC §4705(a) was to aid state and federal law enforcement officers with respect to the enforcement of narcotic laws.

It is clear, therefore, that if the appellant complies with §4705(a) and demands, files and retains the required form incident to a transfer of narcotics, he then becomes subject to a real and substantial danger of prosecution for the violation of either state or federal narcotic statutes. Failure to have a registry and class number would be evidence that appellant had not paid the occupation tax required by 26 USC 4721 and would immediately trigger an investigation of the transfer as being one of unregistered and untaxed narcotics.

The most significant of the prohibitory statutes, as they apply to the appellant, are those of the State of California. The California Health and Safety Code §11500, et seq, provides substantial penalties for possession, possession for sale, transportation and supplying of narcotics. Penalties up to life imprisonment are provided. It is obvious that by the information required on the federal transfer form under the provisions of 26

USC 4705(a) and demanded on the form provided for that section, he has immediately exposed himself to either state or federal prosecution, and possibly both. It is clear that appellant could not withhold inspection from either state or federal officials requesting the information, for to do so would violate another statute, 26 USC 4705(d).

The Fifth Amendment to the United States Constitution makes it mandatory that this court follow the reasoning of the Supreme Court in Marchetti, Grosso and Haynes, supra, and find that appellant's claim of the privilege against self-incrimination is a complete bar to a criminal prosecution for the violation of 26 USC §4705(a).

C O N C L U S I O N

In the four previously stated arguments, we have conclusively proved that the District Court committed clear error in not granting appellant's motion for a continuance in order to obtain the presence of an essential material defense witness. Many current authorities were cited to support the proposition that denial of the opportunity to have witnesses appear in his favor is contradictory and repugnant to the provisions of the Sixth Amendment to the United States Constitution.

In addition to the foregoing, it has been conclusively proved that the trial judge constantly interfered with the examination and cross-examination of witnesses and defendant alike and, in so doing, denied the appellant the fair and impartial trial guaranteed by the provisions of the Sixth Amendment.

It was also proved conclusively that the prosecution was permitted to introduce incriminating hearsay statements which implicated appellant in the crime charged; but which hearsay denied appellant the opportunity of confrontation and cross-examination as guaranteed by the Fifth Amendment to the United States Constitution.

It was further proved conclusively that the federal narcotics enforcement statutes relating to transfers, 26 USC §4705(a), the statute under which appellant was convicted, is unconstitutional being violative of the self-incrimination clause of the Fifth Amendment to the United States Constitution.

In view of the foregoing, it is eminently clear that the appellant in this case was denied a fair trial: First, because of the repeated procedural defects, and, second, because of the inherent unconstitutionality of the statute under which the prosecution took place. Accordingly, we reach the inescapable conclusion that on Arguments I, II and III, appellant herein must be accorded a new trial; and on Argument IV, appellant herein must be found not guilty and discharged. This court is urged to remand the matter to the United States District Court for the Northern District of California for disposition in accordance therewith.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WINSTON BRYANT McCONNEY, Appellant, vs. UNITED STATES OF AMERICA, Appellee.	NO. 22,722 CERTIFICATE OF MAILING

I, MURRAY B. PETERSEN, certify that I am the attorney for appellant in this action, and that I served the foregoing Appellant's Opening Brief on Cecil Poole, attorney for appellee, on March 11th, 1969.

MURRAY B. PETERSEN

Subscribed and sworn to before me, a Notary Public in and for the State of California, County of Alameda, this 11th day of March, 1969.

Georgia L. Davis, Notary Public - State of California
County of Alameda